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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,
v.
HAL NORWOOD, Attorney-General of the State of Arkansas; JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and CHESTER HOLLAND, Prosecuting Attorney for the Twelfth Circuit of Arkansas,
Appellees.
No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S MOTION FOR REHEARING.

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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To the Honorable, the Supreme Court of the United States:

The undersigned, with respect, desires to make the following suggestions, in the nature of a petition for rehearing herein, with a view to the correction of what we think are errors in the decision of the Court:

I.

In setting out the substance of the pertinent allegations of the petition, the Court inadvertently overlooked paragraph V of the petition, which was as follows:

"The Extra Switchmen and Extra Brakemen Provided by the Arkansas Laws Are Not Used in Standard Railroad Practice.

"Plaintiff respectfully presents to the Court that railroad operating conditions on the lines of the plaintiff railroad in the State of Arkansas and elsewhere, and on railroads throughout the United States generally, differ from conditions which existed in 1907 and 1913, when the Arkansas Full-Train-Crew and Full-Switching-Crew Laws were passed, in that additions and betterments have been made to road and equipment in the way of improving and making stronger and more secure the rails, roadbeds and bridges, reducing grades, procuring heavier, stronger and safer engines and cars, and safer power, **so that today freight trains and passenger trains containing many more cars than those which could be safely operated when said laws were enacted can now be operated in Arkansas and throughout the United States generally much more safely than smaller trains could then be operated.**

"Said additions and betterments, costing many millions of dollars, have been made by the plaintiff herein for the express purpose of enabling it to increase its operating efficiency, economy and safety in the run-

ning of longer and heavier freight and passenger trains.

* * * * * * *

"There is no reason, from the standpoint of safety or from any other standpoint, why said extra switchmen and extra brakemen should be employed upon switch engines and freight trains operated into and through the State of Arkansas."

II.

The Court also inadvertently overlooked the following portion of paragraph VI of the petition, to wit:

"Because of the law of Arkansas requiring an extra brakeman upon the plaintiff's freight trains, plaintiff is compelled to employ an extra brakeman in addition to the standard crew required in the operation of its through and local freight trains, and said extra brakeman, being wholly unnecessary in the operation of said trains, customarily leaves said train when the Arkansas state line is reached, and said extra brakeman then customarily deadheads back to the nearest division point on street car, bus or train, and the plaintiff is required to pay said extra brakeman for full time, although very little of said brakeman's time is employed in the actual operation of the plaintiff's trains."

III.

The Court, in its opinion, also overlooked the following allegation in paragraph VIII of the petition:

> "(c) Said statutes are also unreasonable and arbitrary; they bear no real or substantial relation to their ostensible purpose to add to the safety of switching or train operations, and they prevent plaintiff from using, operating and managing its engines and lines of railroad and its railroad facilities situated in the State of Arkansas in a reasonable and lawful manner, and prevent plaintiff from enjoying the benefits and advantages which would accrue to plaintiff from standard, safe and economical operations, all as hereinabove shown."

IV.

In view of the above allegations of fact, which the appellees' motion to dismiss admitted, the Court is in error in concluding that

> "There is no showing that the dangers against which these laws were intended to safeguard employes and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews."

V.

In view of the above-quoted provisions of the petition, it should be evident that the statement that

> "There is no showing that the dangers against which these laws were intended to safeguard employes and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described,"

is erroneous under the rule of law that

> "In testing the sufficiency of pleadings by general demurrer, every reasonable intendment should be indulged to support it."

And it is respectfully submitted that the conclusion of the Court in the opinion in this case is at variance with the established rule of practice prescribed by this Court in similar cases, which holds that it is error to sustain a motion to dismiss where all the facts, which the motion to dismiss admits, establish a prima facie case.

Georgia Power Co. v. City of Decatur, 281 U. S. 505;
Chicago Junction Case, 264 U. S. 262;
Great Northern R. R. Co. v. Minnesota, 238 U. S. 340;
State of Washington v. Fairchild, 224 U. S. 510;
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Banton v. Belt Line, 268 U. S. 413;
Lincoln Gas & Elec. Co. v. City of Lincoln, 250 U. S. 256.

VI.

The Court also overlooked the fact that Congress has defined the word "practice," in Section 1 of the Act to Regulate Commerce, as giving the Interstate Commerce Commission complete jurisdiction to regulate the safety and adequacy of "the supply of trains," and that, in interpreting its powers under this section, the Interstate Commerce Commission has held that:

> "We accordingly find that jurisdiction to regulate the supply of trains for the transportation of property has been vested in us."
>
> In re Train Service on Northern Pacific, 112 I. C. C. 191, decided April 28, 1926.

VII.

The Court also overlooked the fact that, in granting to the Interstate Commerce Commission, as an administrative body, the right to establish rules, regulations and practices, the Commission, by Paragraph 14, Section 1 of the Act to Regulate Commerce, is given the exclusive authority to

> "establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this act,"

and that, by paragraph 17 of section 1 of the act, the only power delegated to the states with reference to car service and "the supply of trains" is

> "to require just and reasonable freight and passenger service for intrastate business";

and that, by paragraph 21 of section 1 of the act the Interstate Commerce Commission is given complete jurisdiction

> "to authorize or require, by order, any carrier by railroad subject to this act, party to such proceeding, **to provide safe and adequate facilities for performing, as a common carrier, its car service, as that term is used in this act.**"

The Court also overlooked the fact that Congress has thus given the Interstate Commerce Commission complete jurisdiction to require common carriers to provide

> "safe and adequate facilities for performing, as a common carrier, its car service, as that term is used in this act."

And since paragraph 10 of section 1 of the act defines the term "car service" as including "the supply of trains," the Interstate Commerce Commission is thus given complete jurisdiction to require carriers to provide a "safe and adequate" supply of trains; that this amendment was first included in the act in 1920, and, having thus been delegated by Congress with complete jurisdiction to provide "safe and adequate" trains, the Arkansas law, which re-

quires trains to be manned with one more brakeman than is necessary for "safe and adequate" service, is clearly inconsistent with the power delegated to the Interstate Commerce Commission.

Wherefore, the appellant prays that the Court may grant it a rehearing, to the end that the above errors in the opinion rendered in this cause may be corrected upon a reargument and resubmission of the cause, for which appellant will ever pray.

Respectfully submitted,

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

We certify that the foregoing motion is well-founded and is not made for the purpose of delay.

T. B. Pryor

Edward J. White

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APPELLANT'S MOTION TO MODIFY MANDATE.

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